

Supreme Court, U.S.
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No. 04-103

In The
Supreme Court of the United States

GREGORY D. STUMBO, *et al.*,
Petitioners,
v.
HOBART WARD ANDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief in Opposition

James Bopp, Jr., *Counsel of Record*
Thomas J. Marzen
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit properly found (a) the scope of Kentucky's ban on electioneering within a 500-foot zone around polling places unconstitutional because the area of the ban is not reasonable and significantly impinges on rights to free speech and association, and (b) Kentucky's definition of "electioneering" is vague and so unconstitutionally overbroad because it bans even distribution of write-in instructions within Kentucky's campaign-free zone.

II. Whether the Sixth Circuit properly found Kentucky's ban on soliciting or receiving gubernatorial campaign contributions within 28 days of election, a feature of Kentucky's public election financing scheme intended to induce voluntary participation in the scheme, is unconstitutional as applied to write-in candidates, who are categorically ineligible to participate in the scheme.

III. Whether the Sixth Circuit properly found Kentucky's absolute ban on post-election contributions and its ban on gubernatorial candidates loaning more than $50,000 their campaigns are unconstitutional.

IV. Whether the Sixth Circuit properly found Kentucky's absolute ban on cash contributions to gubernatorial campaigns is unconstitutionally overbroad.

CORPORATE DISCLOSURE STATEMENT

Respondents are an individual, Hobart Ward Anderson, and Hoby for the Commonwealth, the slate of write-in candidates under which Hobart Ward Anderson was running. There are no other parent corporations for any Respondent, and no publicly held company owns ten percent or more of the stock of any of the Respondents.

TABLE OF CONTENTS

Alternative Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Statement 1

A. Facts 1

B. Proceedings Below 1

Reasons for Denying the Petition 3

I. In Holding Kentucky's 500-Foot Electioneering Ban Unconstitutional, the Sixth Circuit Created No Genuine Circuit Split and Properly Held the Ban Overbroad for Banning Distribution of Write-In Instructions 3

A. The Sixth Circuit Properly Found the 500-Foot Ban Unconstitutionally Overbroad 3

B. The Sixth Circuit Created No Genuine Conflict of Circuits 7

C. The Definition of "Electioneering" Is Unconstitutionally Overbroad 9

II. No Circuit Split on the Validity of "Trigger Provisions" Was Created by the Sixth Circuit 12

III. No Split in Authority on Post-Election Contributions to Repay Candidate Loans Was Created by the Sixth Circuit 15

A. Post-Election Contributions 15

B. Candidates' Contributions to Their Own Campaigns 17

IV. The Sixth Circuit's Decision Holding Kentucky's Ban on Cash Contributions Does Not Raise a Substantial Federal Question 19

Conclusion 21

TABLE OF AUTHORITIES

Cases

Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000) 15-16

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2003) ..... passim

Anderson v Spear, 189 F. Supp. 2d 644 (E.D. Ky. 2002) ... 1

Boos v. Barry, 485 U.S. 312 (1988) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 3, 9, 18, 20

Burson v. Freeman, 504 U.S. 191 (1992) 3-6, 8, 10-11

Calcheera v. Procarione, 805 F. Supp 716 (E.D. Wis. 1992) 8

Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) 13

Ferre v. Florida ex rel Reno, 478 So. 2d 1077 (Fla. App. 1985, aff'd , 494 S.2d 214 (Fla. 1986), cert. denied, 481 U.S. 1037 (1987) 15-17

Franks v. City of Akron, 290 F.3d 813 (6th Cir. 2002), cert. denied, 537 U.S. 1160 (2003) 19

Gable v. Patten, 142 F.3d 940 (6th Cir. 1998), cert. denied, 537 U.S. 1160 (2003) 12-13

McConnell v. Federal Election Comm'n, 124 S. Ct. 619 (2003) 3, 9

Mills v. Alabama, 384 U.S. 214, 218 (1966) 4

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) .....

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996), cert. denied, 520 U.S. 1229 (1997) 13

Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993), cert denied, *511 U.S.1017 (1994)* 7

Schirmer v. Edwards, No. 92-3900 (5th Cir. Oct. 29, 1992) 8

State v. Schirmer, 646 So.2d (La. 1994) 8, 11

Constitution, Statutes, Regulations & Rules

KRS § 117.235 9

KRS 117.235(3) 3

KRS § 121.150(3) 17

KRS § 121.150(16) 15

KRS § 121.150(24) 12

KRS § 121A.010(11)(a) 12

KRS §121A.030 12

KRS §121A.030(5) 12

KRS § 121A.030(5)(a) 12

KRS § 121A.050(2) 19

STATEMENT

A. Facts.

Anderson incorporates by reference the the facts as stated throughout the opinion of the Court of Appeals, *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2003); App. at 3a. Anderson will otherwise state any additional necessary facts as necessary within the Argument.

B. Proceedings Below.

Respondent Hobart "Hoby" Anderson was a write-in candidate in Kentucky's 1999 gubernatorial election. Anderson and his campaign committee, "Hoby for the Commonwealth," brought this action in the United States District Court for the Eastern District of Kentucky against the Kentucky Attorney General, the members of the Kentucky Board of Elections, the members of the Kentucky Registry of Election Finance, and several state prosecutors, all in their official capacities. They sought to enjoin enforcement of certain Kentucky election and campaign finance statutes, including, as relevant here, Kentucky's 500-foot polling place ban on electioneering, it definition of "electioneering," its ban on any solicitation or receipt of contributions within 28 days of an election, its $50,000 limit on candidates' loans to their campaign committees, its ban on all post-election contributions, and its ban on all cash contributions.

Following the submission of cross-motions for summary judgment, the District Court rejected all of Anderson's challenges. *Anderson v Spear*, 189 F. Supp. 2d 644 (E.D. Ky. 2002); App. at 53a. The United States Court of Appeals for the Sixth Circuit reversed in part. Relevant to the Petition presently before this Court, the Sixth Circuit:

1) held unconstitutionally overbroad Kentucky's 500-foot campaign-free zone both because it "prohibits speech over too much geography" and because "it prohibits more speech than necessary to meet the State's protected interests." 366 F.3d at 666; App. at 29a;

2) held unconstitutionally overbroad Kentucky's 28-day ban on contributions before an election as applied to write-in candidates, 356 F.3d at 674-75; App. at 45a-49aa, while it upheld the Kentucky public election financing scheme as a whole and the "trigger provisions" of Kentucky law. 356 F.3d at 675-77; App. at 49a-52a.

(3) held unconstitutional Kentucky's ban on candidates' soliciting or accepting post-election political contributions, and its law limiting to $50,000 candidates' loans to their own campaigns, as "significantly imping[ing] upon a candidate's ability to deliver and to time his or her message." 356 F.3d at 670-673; App. at 40a, 45a; and

(4) struck down the ban on cash contributions as "not closely drawn to avoid unnecessary abridgement of associational freedoms." 356 F.3d at 672; App. at 42a.

Kentucky's petition for rehearing or rehearing en banc was denied. The Attorney General joined by the Kentucky Board of Elections now petition for writ of certiorari. The Kentucky Registry of Election, which defended the challenged portions of Kentucky law below other than Kentucky's ban on electioneering within 500-feet of polling places, chose not to participate in petitioning for writ of certiorari.

REASONS FOR DENYING THE PETITION

I. In Holding Kentucky's 500-Foot Electioneering Ban Unconstitutional, the Sixth Circuit Created No Genuine Circuit Split and Properly Held the Ban Overbroad for Banning Distribution of Write-In Instructions.

The decision of the Sixth Circuit holding Kentucky's 500-foot ban on polling place electioneering, KRS 117.235(3), unconstitutional follows this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), follows *Buckley v. Valeo*, 424 U.S. 1 (1976), and *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619 (2003), and it creates no genuine conflict of Circuits.

Notably, the Sixth Circuit struck down the 500-foot ban on electioneering on two separate and alternative grounds: both because the ban's 500-foot geographical sweep is unconstitutionally overbroad, 356 F.3d at 656-64; App. at 8a-23a, and because its definition of "electioneering" is unconstitutionally overbroad insofar as it bans distribution of even voter write-in instructions. 356 F.3d at 664-67; App. at 23a-29a. Thus, acceptance of the 500-foot issue for review would entail a decision that *both* of these grounds for striking down the ban raise substantial federal questions if the Sixth Circuit decision is to be reversed in this regard. As Anderson will show, however, neither aspect of the Sixth Circuit decision warrants review.

A. The Sixth Circuit Properly Found the 500-Foot Ban Unconstitutionally Overbroad.

Neither the Sixth Circuit nor Anderson dispute that to protect the right to vote, there are compelling state interests in "preventing voter intimidation and election fraud," 356 F.3d at 656; App. at 10a (citing *Burson*, 504 U.S. at 206), or that these interests justify some restriction on the scope of polling place campaigning. Nevertheless, any such restriction impinges on the right to

political speech, and "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Burson*, 504 U.S. at 196 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Thus, state action to protect the right to vote comes into potential conflict with the right to free speech in the context of polling place campaign-free zones.

In such cases, as here, where "the challenged activity physically interferes with electors attempting cast their ballots," a "modified burden of proof" applies. *Burson*, 504 U.S. at 209 n.11. Under this standard, a polling place political speech ban will be given deference, but only "so long as it is reasonable and does not '*significantly impinge* on constitutionally protected rights.'" 356 F.3d at 656; App. at 11a (quoting *Burson*, 504 U.S. at 209, and *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (emphasis in original)). "At some measurable distance for the polls . . . governmental regulation of vote solicitation could effectively become an impermissible burden," rendering it unconstitutional. *Burson*, 504 U.S. at 210 (citing *Mills v. Alabama*). As the Sixth Circuit held, the Kentucky 500-foot ban exceeds this measurable distance.

Kentucky's previous 50-foot "campaign-free zone" covered an area of 7,850 square feet. The Tennessee 100-foot zone at issue in *Burson* covers an area of 31,400 square feet. But the 500-foot zone at issue here covers 785,000 square feet – over 18 acres and 100 times the area circumscribed by Kentucky's previous 50-foot zone, and 25 times the area circumscribed by Tennessee's 100-foot zone.

Further, "it takes approximately 15 seconds to walk 75 feet." *Burson*, 504 U.S. at 210 (quoting *Burson v. Freeman*, 802 S.W.2d 210, 215 (Tenn. 1990)). By this measure, it would have taken 10 seconds to walk through the old 50-foot Kentucky zone.

It takes 20 seconds to walk through the 100-foot Tennessee zone. And it would take 100 seconds or almost 2 minutes to walk through the 500-foot zone at issue here – 10 times longer to walk to the polling place than Kentucky's old 50-foot zone required and about 5 times longer than to walk the 100-foot Tennessee zone requires.

Finally, under the old 50-foot Kentucky ban, free speech prevailed around a 314 foot circumference about the polling place. Under the 100-foot Tennessee ban at issue in *Burson*, it prevails about a 628 foot circumference. But under the challenged 500-foot ban at issue here, there is a 3,140 foot circumference – diluting 100 times the potential access of speaker to listener and of listener to speaker that obtained under the old 50-foot Kentucky ban.

Thus, Kentucky's "campaign-free zone" far exceeds the relatively "minor geographic limitation" at issue in *Burson*. *Id.* It "significantly impinge[s] on constitutionally protected rights" in violation of the modified *Burson* standard. 504 U.S. at 209.

Moreover, the Kentucky ban is not "reasonable," as the *Burson* standard also requires. *Id.* A speech-free zone that encompasses over 3/4 million square feet is obviously not needed to prevent such crowding at polling places that "physically interferes" with the ability to vote.

Nor is such an expansive zone proven necessary to prevent voter corruption or intimidation, as the careful factual deconstruction of these claims by the court of appeals demonstrates. 356 F.3d at 657-63; App. at 12a-23a. Indeed, the record is so devoid of a reasonable justification for the 500-foot ban that the Sixth Circuit suggested that what evidence of intent there is suggests that the "extreme geographic distance was not selected for . . . permissible purposes, but to prevent voters from being bothered by constitutionally protected speech." 356 F.3d at 662;

App. at 20a. To the extent that this is true, the ban cannot even be said to serve a legitimate, much less compelling, state interest and thus must be held unconstitutional for this reason alone.

Petitioners sole argument to counter the Sixth Circuit's analysis of the facts in concluding that interests in prevention of corruption and intimidation are not reasonably served by the 500-foot ban is their general claim that the appellate court failed to pay sufficient deference to the legislature in view of a history of polling place abuse. Petition for Writ of Certiorari ("Petition") at 18-20. In fact, however, the Sixth Circuit was quite plainly prepared to defer to legislative judgment, as indicated by its repeated invocation of the *Burson* Court's modified standard for determining whether the scope of a campaign-free zone passes constitutional muster – a standard that itself incorporates and demands legislative deference.

Moreover, it does not follow that a required degree of deference to legislative judgment demands abject acquiescence. And the Petitioners offer no facts to counter the Sixth Circuit's determination that state interests in preventing corruption and intimidation are not reasonably served by a 500-foot ban on political speech.

Petitioners also suggest that the history of Kentucky polling place corruption justifies its campaign-free zone, Petition at 7a, 16a – corruption that is all too common in the United States and throughout the world. *Burson*, 504 U.S. at 205-07. Certainly, the prospect of intimidation and fraud supports *some* campaign-free zone around polling places, as this Court allowed in upholding Tennessee's 100-foot zone. But Kentucky's zone is 25 times larger than Tennessee's, and there is nothing in the record to suggest that the level of polling place corruption in Kentucky is 25 times greater than in Tennessee – or that increasing the scope of Tennessee's ban on political speech by 25 times would

markedly diminish polling place intimidation or fraud beyond what a 100-foot ban achieves. Kentucky's 500-foot ban simply amounts to legislative over-kill of constitutionally protected free speech rights.

As *Burson* held, it is inappropriate to apply any "litmus-paper test" to separate valid form invalid laws regulating campaign-free zones. *Burson*, 504 U.S. at 210-11. Instead, analysis must proceed on a case-by-case basis to determine whether a campaign-free zone satisfies the "reasonable and without significant impingement" test that *Burson* announced. Here, the Sixth Circuit found that Kentucky's 500-foot ban failed this test, and its balanced judgment in this regard does not present an important federal question warranting review by this Court.

B. The Sixth Circuit Created No Genuine Conflict of Circuits.

Petitioners also claim that there is a live conflict in post-*Burson* circuits created by the Sixth Circuit because it struck down Kentucky's 500-foot ban on polling place political speech, while the Fifth Circuit earlier upheld Louisiana's 600-foot ban in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert denied*, 511 U.S.1017 (1994). The sole factual basis of the Fifth Circuit decision was the expansion of its 300-foot ban to 600 feet after the Louisiana legislature concluded that the 300-foot ban did not prevent the hiring of poll workers. 2 F.3d at 122. Petition at 21.

Subsequent to the Fifth Circuit decision in *Schirmer*, however, the Louisiana Supreme Court, after far more extensive and careful scrutiny of the factual record, held the Louisiana 500-foot ban unconstitutionally overbroad under the U.S. Constitution. *State v. Schirmer*, 646 So.2d (La. 1994). There is thus no live post-*Burson* circuit conflict with regard to the constitutionally of any campaign-free zone ban, much less a ban

that is 500 feet or more. *See also Calcheera v. Procarione*, 805 F. Supp 716 (E.D. Wis. 1992) (Wisconsin's 500-foot campaign-free zone violates standards established in *Burson*).[1] Even if a conflict between the results in the Fifth and Sixth Circuits is perceived to continue to exist, it arises as the result of differing evaluation of different factual records, rather than on the basis of any conflict in the interpretation of the legal principles announced in *Burson*.

Moreover, as the Louisiana Supreme Court noted, the Fifth Circuit decision in *Schirmer* "departed from the prior finding of the state district court under review here, as well as from the reasoning of the prior Fifth Circuit panel [in *Schirmer v. Edwards*, No. 92-3900 (5th Cir. Oct. 29, 1992)] which had granted Schirmer and plaintiffs an injunction. . . ." 646 So.2d at 896. If the Louisiana Supreme Court did not find the Fifth Circuit decision in *Schirmer* either persuasive or implicitly binding with regard to the federal constitutional question it decided, the difference between the Sixth Circuit decision here and the Fifth Circuit in *Schirmer* does not present a conflict sufficiently fresh or sharp to warrant review by this Court.

C. The Definition of "Electioneering" Is Unconstitutionally Overbroad.

The Sixth Circuit also held Kentucky's 500-foot ban on "electioneering" unconstitutionally overbroad because, "absent a narrowing construction, it prohibits more speech than is necessary to meet the State's protected interest[s]" in preventing

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[1]There are numerous pre-*Burson* decisions striking down speech-free zones. *See Burson*, 504 U.S. at 223 (Stevens, J., dissenting). *See also Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (ordinance prohibiting political protest within 500 feet from a foreign embassy was not narrowly tailored but far too broad to protect diplomatic personnel from threats, intimidation, and harassment).

polling place intimidation and fraud. 356 F.3d at 666; App. at 29a.

KRS § 117.235 defines "electioneering" as "the displaying of signs, the distribution of campaign literature, cards, or handbills. . . [,]" and "the Kentucky State Board of Elections has chosen a broad[] – indeed, overbroad – interpretation of the statute in finding that instructions on how to cast an absentee ballot constitute electioneering." 356 F.3d at 666; App. at 26a-27a. The Sixth Circuit deemed the distinction between "express advocacy" and "issue advocacy" recognized by this Court in *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976), viable and necessary in the context of the vagueness and overbreadth of the definition of "electioneering" in the Kentucky ban. 356 F.3d at 665; App. at 24a. It thus held that the definition of "electioneering" was unconstitutionally overbroad for failure to exclude "issue advocacy" – including distribution of information on write-in voting – from the speech banned within 500 feet of polling places.

Petitioners claim that the distinction between "express advocacy" and "issue advocacy" was abolished in principle by *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 689 (2003). Petition at 15-16. This is simply not the case. The *McConnell* Court found only that substantial evidence had shown that the distinction had become "functionally meaningless" when statutory language of is not vague, as in the context of the Federal Election Campaign Act. *Id.* The express/issue advocacy distinction remains valid in the context of a vague statute. And here, not only is Kentucky's definition of "electioneering" vague, but Kentucky "failed to provide any evidentiary support for regulating both express and issue advocacy" in the context of polling place speech. 356 F.3d at 665; App. at 27a. Specifically, it failed to demonstrate that there was any danger that mere distribution of how-to instructions on write-in voting,

as Anderson wished to do, leads to or implicates election fraud or intimidation of voters. So it impossible to see how it is both "reasonable" and does not "significantly impinge" on freedom of speech – the showing required to justify restrictions on campaign-zone speech under *Burson* – to ban such speech.

Apparently conceding that speech on write-in instructions or advocacy of issues like "support our schools" – an example the Sixth Circuit suggests, 356 F.3d at 665; App. at 28a – would not directly implicate state interests in prevention of intimidation and fraud, the Petitioners suggest that issue advocacy would become a subterfuge for expressly advocating the election of candidates. Petition at 16. Such a rule, they claim, would "eviscerate campaign free zone laws by enabling corrupt vote buyers and sellers to gain close proximity to the nations' [sic] polling places, under the guise of claiming a right to engage in 'issue advocacy.'" *Id.* They further argue that specific laws against violence, intimidation, and bribery are insufficient – that a prophylactic statute banning all speech in the vicinity of polling places is necessary to secure elections from corrupt activities. *Id.* at 16-17.

Petitioners' argument is based on sheer speculation. Moreover, it strains credibility to claim that vote buyers and enforcers would or reasonably could masquerade as purveyors of write-in instructions or as advocates urging voters to "save our schools," then mix their message to passing voters in order to induce them to sell their votes or to strong-arm them into voting for a particular candidate. In this regard, Petitioners' argument is akin to a claim that a zone of absolute silence must be maintained within a certain distance of polling places in view of the danger that to allow any speech at all would pose the potential danger of vote buying and intimidation. Such a claim would obviously be deemed to fail the "reasonable" prong of the Burson test, and so does claim that issue advocacy may be constitutionally banned

from Kentucky's campaign-free zone.

There is a potential legitimate concern that crowds of "issue advocates" could, simply by their presence, "physically interfere" with voter access to the polls. But a 500-foot ban on issue advocacy is not reasonably necessary to address this concern, any more than such an extensive ban is necessary to prevent advocates of voting for particular candidates from crowding entrances to polling places. Kentucky's definition of "electioneering" in the context of its 500-foot ban operates to effectively prohibit any and all political speech within over 18 acres around polling places, even political speech like "support our schools" that may not relate to any matter on the ballot. As the Louisiana Supreme Court held with regard to that state's 600-foot ban, "extending a *total* ban on political speech to a distance of 600 feet from polling places, the resulting limitation of free speech at that point overburdens or 'significantly impinges' First Amendment freedoms." *State v. Schirmer*, 646 So.2d at 902 (emphasis in original).

Just as Kentucky's 500-foot ban on campaigning is geographically overbroad, its definition of "electioneering" is overbroad in that it bans all manner of political speech within its 500-foot zone. Petitioners presented no evidence to support that it is reasonable or does not significantly impinge on Anderson's free speech rights. No substantial federal question is presented in this regard.

II. No Circuit Split on the Validity of "Trigger Provisions" Is Created by the Sixth Circuit.

Petitioners' request for review of what they characterize as the Sixth Circuit's "invalidating Kentucky's campaign finance law trigger provisions," Petition at 21, seems to misapprehend the nature of the Sixth Circuit's decision. Kentucky's "trigger provision lifts the contribution cap for candidates participating

in the public finance system, and eliminates the 28-day window restricting contributions for all candidates. KRS § 121.A.030(5)(a)." 356 F.3d at 676; App. at 51a. But the Sixth Circuit specifically *upheld* the "trigger provisions" against Anderson's both facial and as applied attack, acknowledging it was bound by a previous decision in *Gable v. Patten*, 142 F.3d 940, 949 (6th Cir. 1998), *cert. denied*, 537 U.S. 1160 (2003). *See* 356 F.3d at 676; App. at 51a. Moreover, it *upheld* Kentucky's public finance system as a whole against Anderson's as applied attack. 356 F.3d at 675-76; App. at 49a–51a. Thus, there is neither an internal nor external circuit conflict in such regard, as the Petitioners seem to argue. Petition at 23.

The only features of Kentucky law relating public financing of elections at all that the Sixth Circuit held unconstitutional – and then only as applied to write-in candidates – are provisions that prohibit all candidates from receiving contributions in the final 28 days preceding an election, whether or not the candidate is participating in Kentucky's public election financing scheme, KRS §§ 121.150(24) and 121A.030(5). *See* 356 F.3d at 674-75; App. at 45a-49a. The 28-day threshold relates to Kentucky's trigger provisions only insofar as the trigger provisions suspend the 28-day ban on receipt of contributions for gubernatorial candidates who participate in Kentucky's public financing scheme when any candidate who does not participate in the scheme receives contributions of $1.8 million from any source. KRS §§ 121A.010(11)(a) and 121A.030. The Sixth Circuit decision does not at all affect the trigger provisions' other function of lifting the contribution limit for all candidates who participate in the scheme when any candidate receives more than $1.8 million.

Presumably, therefore, Petitioners seek review of only that part the decision that holds unconstitutional the 28-day ban on receipt of contributions to write-in gubernatorial candidates.

Indeed, this is the only aspect of the decision that they can petition this Court to review that relates to Kentucky's public financing scheme. Anderson thus addresses this aspect of the Petition from this perspective.

The purpose of Kentucky's public election financing scheme[2] is to encourage candidates for political office to participate in the program by providing those who do with public campaign funds, while, at the same time limiting the amount of contributions that the candidate can receive as a condition of receipt. However, any financial advantage that scheme participants might gain would be lost if non-participating candidates could outspend participating candidates, while participating candidates would remain bound by their contribution limits. Thus, the 28-day threshold on receipt of contributions that applies to all candidates is released for all candidates if any candidate receives more than $1.8 million – and candidates can continue to receive funds during that time. The 28-day threshold is provided to allow Kentucky authorities time to determine whether the amount has been exceeded and candidates time to receive and spend funds if it has been. It is this general scheme that was previously upheld by the Sixth Circuit in *Gable v. Patton*, 142 F.3d at 949, and other circuits in *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1541 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), and *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000).

But the Sixth Circuit decision at issue here in no way conflicts with these decisions. None of them purport to address the quite narrow issue addressed by the Sixth Circuit: whether

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[2]No public funds have been presently allocated to fund the Kentucky public election financing program, so the program is inoperative now, as it was when the Sixth Circuit rendered its decision. *See* 356 F.3d at 654-56; App. at 5a-8a.

such schemes are unconstitutional *as applied to write-in candidates who are categorically prohibited to participate in the scheme at all*. If the purpose of the scheme is to encourage non-participants to participate in the scheme in service to state interests in prevention of corruption or the appearance of corruption of public officials, then it makes no sense to impose the scheme's 28-day requirement on write-in candidates who cannot participate in the scheme. That is, there is no rational, much less significant or compelling, relationship between the scheme's 28-day contribution limit *as applied to write-in candidates* and the state's interests that the scheme purports to serve.

Further, there is no reason to penalize write-in candidates by imposing the 28-day limit on them for the sake of the scheme itself. As the Sixth Circuit observed, candidates would have an added incentive not to participate when the 28-day limit does not apply to write-in candidates only if eligible candidates surmised that a "write-in candidate would fail to collect more than $1.8 million before the 28-day window closed, but would substantially outstrip [them] in contributions in the final 28 days. This is a highly unlikely scenario at best." 356 F.3d at 675; App. at 48a.

In sum, there is no conflict between circuits created by the Sixth Circuit decision, and there is certainly no substantial federal question presented by a decision that narrowly exempts only categorically ineligible write-in gubernatorial candidates from Kentucky's ban on receipt of contributions within 28 days of elections. The Court should deny review of this issue.

III. No Split in Authority on Post-Election Contributions to Repay Candidate Loans Was Created by the Sixth Circuit.

The Sixth Circuit struck down Kentucky's ban on soliciting or accepting contributions after an election of KRS § 121.150(16). *See* 356 F.3d at 670-71; App. at 40a-43a. It also struck down Kentucky's ban on candidates for Governor and Lieutenant-Governor making loans to their own campaigns over $50,000 of KRS §§ 121.150(13) and (21). *See* 356 F.3d at 672-73; App. at 43a-45a.

Petitioners' "Question Presented III" suggests that they wish this Court to review both of these aspects of the Sixth Circuit decision, though their argument focuses on a claimed split of authority created by the Sixth Circuit's decision striking down Kentucky's post-election contribution ban and decisions of the Alaska Supreme Court and a Florida Court of Appeals upholding post-election contribution bans in *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 630 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000), and *Ferre v. Florida ex rel Reno*, 478 So. 2d 1077, 1079 (Fla. App. 1985, *aff'd* , 494 S.2d 214 (Fla. 1986), *cert. denied*, 481 U.S. 1037 (1987). *See* Petition at 26. There is no even potential conflict of circuits or authorities with regard to the Sixth Circuit's decision striking down Kentucky's $50,000 limit on candidates' loans to their own campaigns on its face.

A. Post-Election Contributions.

First, there may be a special interest in preventing the appearance of corruption that might justify certain greater constraints on post-election contributions than on pre-election contributions in the interests of avoiding corruption and the appearance of corruption, as the Alaska and Florida courts suggest. But the Kentucky ban on post-election contributions is absolute – a zero contribution limit – and it applies to both

winning and losing candidates.

As the Sixth Circuit observed, this absolute ban on post-election contributions is not "closely drawn" to satisfy the state interests at stake. 356 F.3d at 670; App. at 38a-39a. In every election, 50% or more of candidates will lose and thus cannot be sources of official corruption or the appearance of official corruption due to receipt of post-election contributions. So a statute that bans all post-election contributions for all candidates cannot be rationally, much less closely, related to the state's interests at stake since it *always* restricts the free speech of as many or more candidates who cannot violate the state interests than it restricts the speech of those who can.

Petitioners' claim that the absolute ban is nevertheless justified because "[l]osing candidates often hold or seek other public offices and can be expected to exert great pressure on business people and regulated industries." Petition at 27. But this is an argument in favor of prohibiting any elected official or aspirant to public office from ever soliciting or receiving contributions at any time, not simply during some post-election period, whoever that might be defined.

Second, Petitioners' claim that there is a "conflict of authority" overstates the nature of the disagreement between the Sixth Circuit and the Alaska and Florida state courts. The Alaska decision in this regard consists of only two conclusory sentences. *See Alaska v. Alaska Civil Liberties Union*, 978 P.2d at 630. It hardly presents a sharp, well-developed conflict with the Sixth Circuit's decision.

The particular concern expressed by Florida decision in *Ferre* is that "a candidate could make large expenditures, secure in the knowledge that immediately after the election members of some currently unpopular group whose support for candidate had not theretofore been disclosed would send in contributions," thus

providing no notice to voters who would not have voted for the candidate with such bedfellows. *Ferre*, 487 So. 2d at 1080. In Kentucky, however, the $1,000 contribution limit of KRS § 121.150(3) significantly mitigates any potential for voter concern that a candidate may peddle post-election influence to a "surprise" large contributor. The $1,000 limit assures voters that no single contributor will exercise undue influence on now-elected official through an excessively large contribution.

The Florida court neither addressed the impact of contribution limits nor imposition of a ban on post-election contributions to both winners and losers as the Sixth Circuit did. Again, as with *Alaska*, *Ferre* does not present a case in which the issues are sufficiently explored to justify review based on a conflict of authorities. At the very least, further development of the law should occur before discretionary Supreme Court review is warranted.

A concern over the appearance of corruption cannot justify a total ban on contributions after an election any more than it can before an election. A special interest in preventing the appearance of corruption due to post-election contributions might justify a more narrowly tailored solution – such as a lower contribution limit for contributions made to winners after elections than the $1,000 ceiling imposed on pre-election contributions. But the Kentucky zero contribution post-election rule applied to both winners and losers goes too far. In this regard, the Sixth Circuit's decision does not raise a substantial federal question.

B. Candidates' Loans to Their Own Campaigns.

To the extent that the Petitioners seek review of the Sixth Circuit's decision holding the $50,000 limitation on candidate loans to their own campaigns unconstitutional, it appears to be on the grounds that lifting the loan limitation, when coupled with

lifting the ban on post-election contributions, presents a special opportunity for quid pro quo corruption or apparent corruption. Petition at 25. Petitioners nowhere contest the Sixth Circuit's reasoning in arriving at the conclusion that Kentucky's loan limitation is unconstitutional on its face under *Buckley* because loans are expenditures and *Buckley* holds that candidates' own expenditures on their own campaigns cannot be limited. *See* 356 F.3d at 672; App. at 43a.

If the $50,000 loan limit is unconstitutional on its face, however, then there is no particular circumstance in which it is constitutional. Thus, Petitioners' argument seems to be directed toward bolstering its claim that the Sixth Circuit's holding that Kentucky's post-election contribution ban is unconstitutional should be reviewed rather than toward urging review of the Sixth Circuit's ruling against Kentucky's $50,000 loan limitation.

In any event, lifting the lid on candidates' loans to their own campaigns does not logically increase the prospect of post-election corruption or the appearance of corruption because Kentucky's $1,000 contribution limitation defuses the prospect that any single contribution or potential "bundle" of contributions can buy the influence of a winning candidate. To the extent that a candidate makes a loan to her campaign in excess of $50,000 that is not repaid before an election, then post-election repayment would simply require a greater number of $1,000 contributions – thus weakening rather than strengthening any potential influence or perception of influence that any individual post-election contributor might have on a winning candidate. The effect increases exponentially when contributions that pay post-election loan debts are made to losing candidates.

The Sixth Circuit was clearly correct in refusing to sustain Kentucky's $50,000 loan limit on this basis. Certainly, no substantial federal question is raised by this narrow issue.

IV. The Sixth Circuit's Decision Holding Kentucky's Ban on Cash Contributions Does Not Raise a Substantial Federal Question.

Finally, Petitioners, Petition at 28a, request review of the Sixth Circuit's holding that Kentucky's total ban on cash contributions to candidates for Governor and Lieutenant Governor of KRS § 121A.050(2) is unconstitutional. 356 F.3d at 671-72; App. at 40a-42a. They claim that without reversal, "states within the Sixth Circuit will be precluded from requiring political donations to campaigns be made by check or money order," and hence "hampered in their investigations of illegal slush funds used to by votes, or engage in violations of campaign finance laws." Petition at 29. They also claim that Kentucky's "notorious history of political corruption" justifies its absolute ban on cash contributions in gubernatorial elections. *Id.*

In another decision that the panel in this case did not purport to overrule, the Sixth Circuit has upheld a ban on cash contributions over $25 on the grounds that it "serves the significant governmental interest of accountability by forcing contributions to be traceable." *Franks v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003). Thus, it is hardly the case that Sixth Circuit states will be altogether precluded from requiring even rather small contributions from being traceable through check or money order.

Moreover, as the appellate court observed, "to the extent that Kentucky's interest in preventing corruption descends to the smallest contributions, the State could have easily promoted disclosure by requiring campaigns to take the name of the person making the contribution." 356 F.3d at 672; App. at 42a. Requiring some form of personal identification might also be required.

An *absolute* ban on cash contributions strongly discourages those usually poorer citizens who do not have access to credit

cards, money orders, or checks available, or who are loathe to pay the extra costs involved in their use, from contributing to campaigns. It strongly discourages those citizens who only wish to or are able to make some small contribution to a campaign – as opposed to the wealthy who are willing and able to make the large contribution that truly poses a threat of actual or apparent corruption. Moreover, it disproportionately penalizes those candidates, like most write-in and third-party candidates, who rely principally on small contributions to sustain their campaigns. Anderson, for example, objected to the total ban because it made it nearly impossible to sell snow cones, water bottles, t-shirts, and other inexpensive merchandise at fairs and flea markets to raise campaign money.

Whatever benefit there might be in making such small contributions somewhat more easily traceable is clearly outweighed by the special burden on the exercise of associational rights that it imposes on the very citizens and candidates who are least likely to pose a threat of actual or apparent official corruption. Although discretionary latitude should be provided to government on the amount of a cash contribution that a government could properly demand be more easily traceable, the $0 cash contribution ban at issue here does not even purport to attempt to apply the "closely drawn" requirement that *Buckley v. Valeo*, 424 U.S. at 25, demands in this context.

Petitioners' reliance on the claimed especially corrupt history of Kentucky elections adds little in favor of review by this Court. The ban on all cash contributions applies only to gubernatorial elections, but the Petitioners have not shown that gubernatorial campaigns uniquely or especially rely on small cash contributions to fuel their corruption. Indeed, in state-wide gubernatorial campaigns, small cash contributions are likely to play a greatly diminished role compared to the large contributions that the power of the Governor is likely to attract.

There is no conflict of circuits or even any internal circuit conflict on this matter. The insubstantial contributions involved do not raise a substantial federal question. Review of the Sixth Circuit decision should be denied in this regard.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

James Bopp, Jr., *Counsel of Record*
Thomas J. Marzen
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (fax: 812/235-3685)
Counsel for Respondents